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No. 84-1098

In the Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION, PETITIONER
v.
LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a rule issued to express the Environmental Protection Agency's interpretation of Section 207(c)(1) of the Clean Air Act, 42 U.S.C. 7541(c)(1), was an "interpretative" rule and therefore properly issued without notice and opportunity for comment.

2. Whether the court of appeals correctly sustained the interpretative rule at issue as a reasonable interpretation of Section 207(c)(1) of the Clean Air Act.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A1-A48) is reported at 742 F.2d 1561. The vacated opinion of the court of appeals panel (Pet. App. B1-B67) is reported at 724 F.2d 979.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on September 7, 1984. By order dated November 29, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In an effort to mitigate the harm to human health and the environment caused by air pollution resulting from motor vehicles, Congress enacted Title II of the Clean Air Act of 1970, 42 U.S.C. 7521 *et seq.* Section 202 of the Act, 42 U.S.C. 7521, requires the Administrator of the Environmental Protection Agency to prescribe emission standards that motor vehicles must meet during their useful lives. Section 202(d)(1) of the Act, 42 U.S.C. 7521(d)(1), provides that the useful life of a passenger car is five years or 50,000 miles, whichever first occurs.

Under Section 206 of the Act, 42 U.S.C. 7525, the Administrator may require new motor vehicles to be tested prior to sale to determine whether they conform to the emission standards prescribed by Section 202. Aware that presale tests would not be adequate to ensure that vehicles continue to meet the emission standards while in actual use, Congress also enacted warranty and recall provisions applicable to vehicles after their sale to consumers. See 116 Cong. Rec. 33093 (1970) (statement of Sen. Muskie). The warranty provisions, found in Section 207(a) and (b), 42 U.S.C. 7541(a) and (b), provide for the repair of isolated, individual vehicle failures. The recall provision of Section 207(c), 42 U.S.C. 7541(c), at issue in this litigation, provides a remedy when substantial numbers of vehicles in a given production class exceed emission standards.

Specifically, Section 207(c)(1) provides that if the Administrator determines that a substantial number of a class of vehicles, although properly maintained and used by consumers, fail to conform to federal emission standards while in actual use throughout their useful lives, he shall notify the manufacturer of the nonconformity. Section 207(c)(1) then requires the manufacturer to submit, for EPA's approval, a remedial plan to recall and repair the nonconforming vehicles in the class at the manufacturer's expense.

2. EPA began investigating 1975 Cadillacs (of engine family 60V43) in May 1975 when assembly line data indicated that a significant carbon monoxide (CO) problem might exist in those vehicles. By mid-1976, EPA had gathered and informed petitioner, General Motors Corporation, of additional evidence that the Cadillacs were emitting, in actual use, CO substantially in excess of the federal standard. These findings were confirmed between November 1976 and January 1977, when petitioner conducted retests of some of the vehicles sampled by EPA. Pet. App. B4-B5.

On March 21, 1977, the Administrator notified petitioner that he had determined that a substantial number of 1975 Cadillacs (of engine family 60V43 with carburetor part No. 7045230), although properly maintained and used, failed to meet the federal CO emission standard within their useful lives. Accordingly, the Administrator required petitioner to submit a remedial plan for that class of vehicles. Pet. App. A4.

Initially, petitioner submitted a plan for a voluntary recall of the 1975 Cadillacs; that plan "specifically provided that '[a] vehicle affected will be eligible for repair under the remedial plan, regardless of vehicle age, mileage, or owner' " (Pet. App. A4-A5 & n.2). EPA did not approve the proposed plan, however, and negotiations continued for two years between EPA and petitioner over the effectiveness of the proposed plan and petitioner's obligation to audit the performance of completed repairs (*id.* at A4-A5). In December 1979, EPA withdrew its demand that petitioner conduct an audit of the repairs mandated by the recall, informed petitioner of its intent to conduct its own audit, and approved the proposed remedial plan (*id.* at A5).

Shortly thereafter, however, petitioner informed EPA for the first time that it would exclude from the plan all nonconforming vehicles that were beyond their five-year/50,000 mile useful lives at the time presented for repair

(Pet. App. A5 & n.4). Subsequently, EPA published, on May 30, 1980, an interpretative rule setting forth its established interpretation that Section 207(c)(1) requires a manufacturer to remedy, at its expense, all vehicles in a recalled class if those vehicles have been properly maintained and used and have experienced a nonconformity during their useful lives, regardless of their age or mileage at the time presented for repair (45 Fed. Reg. 36396; Pet. App. E1-E9). On June 23, 1980, in keeping with this interpretation, the Administrator partially disapproved a remedial plan submitted by petitioner, because the plan excluded vehicles that might have experienced a nonconformity during their useful lives but would exceed five years/50,000 miles at the time presented for repair (Pet. App. A6).

2. Petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit of the May 1980 interpretative rule, and petitioner also sought review of the Administrator's partial disapproval of the Cadillac remedial plan. The court of appeals consolidated the two petitions for review. Pet. App. A6 & n.5.

a. On December 16, 1983, a divided panel of the court of appeals issued an opinion vacating the agency's interpretative rule and final order of disapproval (Pet. App. B1-B67). Senior Judge Bazelon, writing for the majority, held that under Section 207(c)(1) of the Clean Air Act, an automobile manufacturer is not responsible for the repair of recalled vehicles that are beyond their useful lives at the time presented for repair. The panel reached this conclusion even as it admitted that its "holding may impede the enforcement of emission standards even for cars within their useful lives" and that the "recall system may be rendered useless" (Pet. App. B39). Judge Wilkey filed a concurring opinion setting out four possible constructions of Section 207(c)(1) and identifying the construction he believed best comported with the statute and the legislative

history (Pet. App. B43-B46). Judge Wald, in dissent, stated that the panel's decision invalidating EPA's interpretative rule had overstepped appropriate bounds for judicial review of an enforcement agency's reasonable statutory interpretation and that the panel's decision would permit automobile manufacturers to circumvent, in whole or in part, Section 207's recall and repair obligations through a strategy of engaging in prolonged litigation (Pet. App. B47-B67).

b. The court of appeals granted the government's suggestion for rehearing en banc. Judge Wald, this time writing for an eight-judge majority, sustained the agency's interpretative rule and final order (Pet. App. A1-A23). The en banc court held that EPA's actions were consistent with the language, legislative history, and purposes of the Clean Air Act (*ibid.*). Senior Judge Bazelon, joined by Judges Tamm and Wilkey, dissented (*id.* at A24-A48).

ARGUMENT

The decision of the en banc court of appeals, characterized by petitioner as raising an issue of "first impression" (Pet. 3), is correct and does not conflict with any decision of this Court. Moreover, petitioner has failed to demonstrate that acceptance of its arguments by this Court would alter the result reached by the court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly ruled — and on this issue the en banc court was unanimous — that EPA's May 30 rule was an interpretative rule (Pet. App. A7-A10, A24 n.3). Hence, the rule is not void for failure to follow the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553(b)(A).[1]

[1]The APA exempts from its notice and comment procedures "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)). The rulemaking provisions of the Clean Air Act incorporate this provision of the APA (42 U.S.C. 7607(d)(1)).

Although petitioner contends that considerable confusion exists regarding the distinction between interpretative and legislative rulemaking, EPA's May 30 rule is a classic example of an interpretative rule. An interpretative rule simply states what the administrative agency thinks the statute means; it only " 'reminds' affected parties of existing duties." *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 & n.153 (D.C. Cir. 1979). See generally *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947).[2]

The May 30 rule fits the accepted definition of an interpretative rule perfectly. All that it does and all that it purports to do is set forth EPA's interpretation regarding a manufacturer's recall liability under Section 207(c)(1). See 45 Fed. Reg. 36396 (1980); Pet. App. E1. Indeed, petitioner's principal challenge to the May 30 rule — that EPA has misinterpreted the scope of a manufacturer's liability under Section 207(c)(1) — in effect characterizes the rule as interpretative. The only "requirement" of the May 30 rule is to remind manufacturers of their statutory obligation to submit plans, when ordered to do so, that conform to EPA's interpretation of Section 207(c)(1). It is a manufacturer's refusal to comply with a recall order issued under the statute, and not its refusal to comply with the interpretative rule, that is punishable by the statute.

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[2]In *Steadman* v. *SEC*, 450 U.S. 91, 103 n.22 (1981), the Court observed:

> We have previously noted that the Attorney General's Manual on the Administrative Procedure Act (1947) has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. at 546, and Justice Clark was Attorney General both when the APA was passed and when the Manual was published.

Thus, the May 30 rule did not create any new rights or duties; it simply restated the consistent agency practice in conducting recalls pursuant to Section 207(c)(1). As the rule itself explains, "[i]n the past, manufacturers have not conditioned a vehicle's eligibility for recall repair * * * on the basis of the vehicle's age or mileage" (Pet. App. E2). Not until petitioner announced in February 1980 that it would exclude older cars from the remedial plan that it had previously proposed did EPA find it necessary to publish its interpretation of Section 207(c). See Pet. App. A8-A10 n.7.

Although petitioner contends (Pet. 13) that review should be granted because the various circuits sometimes employ different formulations to distinguish legislative rules from interpretative rules, those differences, even assuming they exist, are not material here, because EPA's May 30 rule would be considered interpretative under any established test. Moreover, petitioner has failed utterly to demonstrate how its own proposed test (*id.* at 13-15) would produce a different result in this case. Petitioner apparently would employ a three-factor analysis. First, it would look to congressional intent; under this factor, "rules that essentially restate or explain Congress' intent may fairly be considered interpretative" (*id.* at 13 (footnote omitted)). As we explain later in this brief (see pages 12-15, *infra*), EPA's May 30 rule did exactly that.

Second, petitioner would consider (Pet. 14) whether an agency's regulation involves significant policy determinations; if it does, petitioner would characterize the rule as legislative. Here, EPA's May 30 rule did not, and did not purport to involve any significant policy determination not already made by Congress. To be sure, petitioner argues that the rule "expands" the liability of manufacturers under Section 207(c)(1) (Pet. 20-21, 27). But the recall plan requirement described in the May 30 rule is mandated by Section 207(c)(1) itself, and merely clarifies and restates

EPA's long-standing interpretation of the statutory obligation for a class-based recall and repair without regard to the age or mileage of each vehicle when presented for repair. Thus, petitioner's dispute with the agency is merely about the meaning of the statutory provision itself. Since the rule does not purport to "expand" the liability of manufacturers beyond that provided in the statute itself, it would not be legislative even under petitioner's own analysis.

Finally, petitioner would consider whether an agency's regulation has a " 'substantial impact' " on individual rights and liabilities (Pet. 14-15). Again, EPA's May 30 rule does not constitute a legislative rule under petitioner's own "substantial impact" analysis. It was the statutory requirements of Section 207(c) itself, of which petitioner merely was "reminded" by the May 30 rule, that had a "substantial impact" on automobile manufacturers.[3] In sum, petitioner's

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[3]Petitioner claims (Pet. 27-29) that if the court of appeals' decision upholding the interpretative rule is allowed to stand, manufacturers' liability for recalls will increase dramatically. Petitioner also suggests (*id.* at 27) that recalls have escalated greatly since the interpretative rule was published in 1980 and, therefore, that the number of older vehicles eligible for repair under the rule also is growing. These claims are both inaccurate and irrelevant.

Petitioner's argument, once again, is premised on the erroneous assumption that the interpretative rule exceeded the intended scope of Section 207(c)(1) of the Act by making manufacturers liable for recall and repair of nonconforming vehicles that are past their statutory useful lives. However, as the court of appeals correctly concluded, the interpretative rule "did not create any new rights or duties," but merely restated "the consistent practice of the agency in conducting recalls pursuant to section 207(c)" (Pet. App. A8). Moreover, the court concluded that EPA's interpretation was amply supported by the language, legislative history, and purposes of Section 207(c)(1), as well as by relevant case law (Pet. App. A13, A16, A17 & n.12, A20-A22). Therefore, whatever number of vehicles may be recalled in the future, that number will be due to the implementation of purely statutory requirements and not to the interpretative rule.

In addition, petitioner is simply wrong in suggesting that the number of vehicles recalled has risen drastically since 1980. Contrary to

own approach to the legislative/interpretative rulemaking dichotomy shows that there is no need for further review of the unanimous judgment of the en banc court of appeals that the May 30 rule was an interpretative rule.

2. Petitioner next contends (Pet. 21-26) that the court of appeals compounded its alleged error when, after determining that the May 30 rule was interpretative rather than legislative, the court applied the "highly deferential" (*id.* at 21) standard of review articulated in *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), to its review of the May 30 rule. Petitioner's argument is erroneous.

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petitioner's assertion (Pet. 27), the total number of vehicles recalled in 1979 (before the interpretative rule was issued) was not 837,000, but approximately 2.5 million. Petitioner's calculations of vehicles recalled in 1979 and 1983 purportedly were derived from Attachment 7 to an EPA Staff Memorandum of May 9, 1980. Pet. 27 n.31. That memorandum is included in the appendix to the petition (Pet. App. H1-H8), although Attachment 7 is not. In any event, Attachment 7 (which is part of the record below) clearly indicates that the total number of vehicles recalled in 1979 was about 2.5 million. This figure includes voluntary as well as mandatory recalls, as does the 1983 total of 3 million that petitioner uses for comparison purposes. (Interestingly, petitioner has not mentioned that Attachment 7 also shows that the total number of vehicles recalled in 1978 likewise was about 2.6 million.) These figures are not dramatically different from the 1983 total of 3 million vehicles (correctly cited by petitioner) and demonstrate that the total number of vehicles recalled and, therefore, the impact of the interpretative rule on the total number of vehicles eligible for repair, is not rising substantially.

In any event, petitioner has failed to show how the number of vehicles recalled in any given year is even relevant to the questions whether EPA has correctly interpreted the statute and whether the court of appeals properly upheld that interpretation. Since the interpretative rule merely restated EPA's long-standing and consistent application of Section 207(c)(1) (see Pet. App. A3, A8 & n.7), the rule itself (whether or not the underlying interpretation is correct) could not be the cause, per se, of any increase in recalls. For the same reason, the number of vehicles recalled before and after the interpretative rule was issued has no bearing on whether EPA properly interpreted the statute in the first place.

First, petitioner seems to proceed on the assumption that the principle of deference to administrative expertise applied in *Chevron* established new law. As the Court explicitly recognized, however, the principle is of long-standing vintage. *Chevron,* slip op. 6-7 & n.14.[4] Thus, the court of appeals cited *Chevron* only for the well-established proposition that a reviewing court may not substitute its judgment for that of the agency if the agency's interpretation is "sufficiently reasonable" (Pet. App. A11 (citation omitted)). See also *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *United States* v. *Shimer,* 367 U.S. 374, 381-382 (1961). Although it is true that *Chevron* involved judicial review of legislative rulemaking, nothing in the opinion purports to limit the traditional deference principle to such cases, nor to alter the well-established proposition that "the interpretation given [a] statute by the officers or agency charged with its administration" is entitled to substantial deference. *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 566 (1980) (quoting *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978)).

Second, the court of appeals did not in any event substitute blind "deference" to EPA for its own review of the statute and its legislative history. Instead, the court reviewed the contentions of the parties at length (Pet. App. A12-A22) and concluded that EPA's position found "substantial support, *and no contradiction,* in the language and legislative history of section 207 of the Clean Air Act" (*id.* at A11 (emphasis added)). In these circumstances, even the

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[4]Although the principle is by no means new, it undoubtedly has taken on increasing importance — indeed, necessity — with the advent of extraordinarily technical and complex statutes such as the Clean Air Act. Cf. *Chemical Manufacturers Ass'n* v. *NRDC,* No. 83-1013 (Feb. 27, 1985), slip op. 8-9. Petitioner has not identified any compelling reason for ignoring this reality in the instant case.

most minimal degree of deference to administrative expertise would require upholding the agency's interpretation.

Finally, petitioner again has failed to explain how the outcome of this case would have been any different if, instead of citing *Chevron,* the court of appeals had applied the standard enunciated in *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944). On the contrary, the court of appeals explained at length (see, *e.g.,* Pet. App. A8-A11 n.7) the basis for its conclusion that EPA's interpretation of Section 207 was longstanding, consistent, and the product of the agency's specialized expertise. Thus, the court's validation of the agency's interpretation rested on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade * * *." *Skidmore,* 323 U.S. at 140.[5]

3. Although petitioner lists the court of appeals' ultimate determination to sustain the agency's May 30 rule as a question presented by the petition (Pet. i), petitioner has not discussed that issue in the petition itself. Accordingly, we set forth here only a brief description of the merits of the

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[5]Petitioner contends (Pet. 26) that the courts of appeals are in conflict over the applicability of *Chevron's* principle of deference to interpretative rules. The conflict, if any, is quite illusory. For example, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n,* 742 F.2d 1, 11 (1st Cir. 1984), did not even involve an interpretative rule; instead, the court refused to defer to the interpretations of the agency's General Counsel, "contained only in his brief." And in *Capitano* v. *Secretary of Health and Human Services,* 732 F.2d 1066, 1076 (2d Cir. 1984), the court refused to defer to the agency upon concluding that the agency's interpretation was inconsistent with the spirit of the statute. In the instant case, by contrast, the court of appeals expressly concluded (Pet. App. A20-A22) that the May 30 rule furthers the purposes of Congress in enacting the Clean Air Act. There is nothing in the opinion to suggest that the court would have accorded undue deference to the agency's interpretation had it concluded otherwise.

controversy, sufficient to demonstrate that the court of appeals was correct in upholding the agency's May 30 rule.

a. EPA's interpretative rule simply follows the statutory directive enacted by Congress in Section 207(c), which mandates a class-based approach to recalls. Section 207(c) reads, in pertinent part:

> (1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. * * *
>
> (2) Any notification required by paragraph (1) with respect to any class or category of vehicles or engines shall be given to dealers, ultimate purchasers, and subsequent purchasers (if known) in such manner and containing such information as the Administrator may by regulations require.

Thus, the statute requires that notification of a recall go to owners of all vehicles within an entire class, without distinction among individual vehicles. The statute further requires a manufacturer to remedy the nonconformity "of the vehicles with respect to which * * * notification is given," *i.e.*, every nonconforming vehicle within the entire class of vehicles, with but one exception for vehicles that have not been "properly used and maintained." Otherwise,

the statutory language on its face allows no exception to a manufacturer's obligation to repair all vehicles within a particular recalled class that exceeded the standards during their useful lives.

The interpretative rule tracks the statute, by focusing on a class of vehicles. The rule clarifies that the manufacturer's remedial obligation includes all the vehicles within the class that exceed standards during their useful lives, even if they are beyond their useful lives at the time presented for repair, since it is clear that even such older vehicles are within the class for which notification was given.[6]

In short, if a class of vehicles fails to conform to the standards during the useful life of those vehicles, the obligation to recall and repair the class does not end as individual vehicles cross the five-year/50,000 mile threshold. The fact remains that vehicles in the class failed to meet the standards during their useful lives. The nonconformity of the class can be corrected only by repairing each nonconforming vehicle in the class, as the statute and the interpretative rule require.

Petitioner's interpretation of Section 207 would effectively rewrite the statute. Under petitioner's reading, manufacturers would be required "to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given[,]" *except for those vehicles that will have passed beyond their useful lives at the time presented for repair.* The remedial plan would "provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer[,]" *except for those vehicles*

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[6]A manufacturer is not liable for repairs to the extent it can affirmatively demonstrate that a particular vehicle within the recalled class did not exceed the standards during its useful life.

that have passed beyond their useful lives at the time presented for repair. If Congress had intended this scheme, it easily could have drafted the statute in this fashion. Accordingly, the court of appeals properly declined petitioner's invitation to interpret the statute as if Congress had enacted such a limitation. See, *e.g., Grove City College* v. *Bell,* No. 82-792 (Feb. 28, 1984), slip op. 8.[7]

b. EPA's interpretative rule also is fully consistent with the purposes of the Clean Air Act in general and Section 207(c) in particular. One of the principal purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" (42 U.S.C. 7401(b)(1)). EPA's interpretation of Section 207 advances that purpose by ensuring that manufacturers retain the incentive to design pollution control equipment that will last the full useful life of five years or 50,000 miles. Petitioner's interpretation, on the other hand, would allow manufacturers to breach that requirement and escape the consequences. For example, a manufacturer could employ an emission control system that would function only for 40,000 miles, knowing that by the time EPA sampled a "substantial number" of high-mileage cars to discover the defect and institute recall proceedings, most (if not all) of the vehicles in the class would have passed the 50,000-mile mark. In addition, manufacturers could limit their liability substantially by delaying administrative recall proceedings and engaging in protracted litigation after a nonconformity was discovered, so that most (if not all) of the vehicles in the class would have exceeded their useful lives before being presented for repair. Thus, the public would be forced to

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[7]The court of appeals discussed the legislative history of Section 207 at length and demonstrated that it fully supports EPA's interpretation of the statute. See Pet. App. A16-A20. Accordingly, we will not repeat that discussion here.

bear the burden of this additional increment of air pollution without effective recourse through the mechanism of Section 207(c). The courts will not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Mfrs. Inst., Inc.* v. *Donovan,* 452 U.S. 490, 513 (1981) (citations omitted). Accordingly, EPA's interpretation of Section 207 fully comports with, and does not exceed, the expressed intent of Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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